Pension Planning

a journal devoted to the regulatory, investment, actuarial and asset management aspects of pensions

Volume XV, No. 3 2010

Highlights

TREATY RIGHTS

changes to the Canada-U.S. tax treaty

After 10 years of negotiations, Canada and the United States signed the Fifth Protocol to the Canada-United States Income Tax Convention in 2007. These changes came into force during 2008 and 2009. A number of the changes affect pension plans – both in the operation of the plans and investment of the pension funds. Pension plan contributors and beneficiaries are also affected, since changes have been made in respect of short-term work assignments, cross-border commuters, and U.S. citizens working in Canada. Henry Visser discusses the changes to the treaty. 1018

GOVERNANCE

governance and investment guidance

Hugh Wright summarizes the Ontario Court of Justice decision in *R. v. Christophe*, where quasi-criminal charges were brought against members of a pension plan's Board of Trustees and Investment Committee. The case provides pension plan administrators with cautionary notes with respect to proper governance processes, including the adoption of appropriate investment policies, the engagement of independent expertise, the supervision of delegates and agents, and clear documentation of decision-making. 1023

PLAN TERMINATION

annuity purchases on partial wind-up

The Ontario Financial Services Tribunal recently released its decision in *Imperial Oil Limited v. Superintendent of Financial Services (Ontario)*. Imperial Oil Limited had challenged the Ontario Superintendent's order to require the purchase of annuities for pension plan members affected by a series of partial plan wind-ups who did not elect to have their pension entitlements transferred out of the Plans. Kevin MacDonald examines the decision of the Financial Services Tribunal and subsequent legislative changes introduced by the Ontario Minister of Finance. 1026

EXPENSES

GST changes affecting pension plans

Lisa Chamzuk discusses certain proposed changes to the application of GST in respect of pension plans. The Department of Finance has announced that all pension plans will qualify for a rebate of GST paid. It also announced that changes will be made to the *Excise Tax Act* to exclude investment management fees from a GST exempt class of services. 1030

CHECKLIST 1031

Federated Press

investment manager. The Court held that because the investment manager in question did not seek instructions from the client to initiate and make trades (it had discretion to make those decisions), its activities were properly described as "financial services" and thus exempt from GST.

The Canada Revenue Agency did not seek leave to appeal the CMPA decision to the Supreme Court of Canada. A number of pension plan and employee benefit plan administrators filed applications with the Canada Revenue Agency for a rebate of GST as permitted by the terms of the ETA, on the strength of the CMPA case.

However, in December of 2009, the Department of Finance issued a news release advising of its intention to amend the ETA to exclude investment management services from the definition of "financial service" which, as noted above, is an exempt supply under the ETA. More surprising than the government's decision to amend the ETA was its decision to make that amendment retroactive. That is, it appears that the amendment will not only apply to investment management services rendered after the date of the announcement (being December 14, 2009), but also in respect of investment management services rendered after the CMPA decision and before that announcement date. The announcement did not grandfather those plans that had made an application for a refund of GST on the basis of the law as it stood after the CMPA decision was released.

The only exception noted in the press release issued by the Department of Finance is if the investment manager did not charge GST in that intervening period.

We have yet to see draft legislation amending the ETA, but in the recent Federal Budget announcement, the Finance Minister confirmed the Department's intention to proceed with the announced changes in respect of GST and investment management fees. We will be watching this legislation carefully and expect that if it is introduced on a retroactive basis, it might be subject to legal challenge.

Checklist

This feature will regularly examine and report on recent developments affecting pensions and pension planning.

Cases

Hydro One: Ontario's Partial Wind-up Laws Continue to Evolve

Peggy A. McCallum
Fasken Martineau DuMoulin LLP

Much to the relief of employers with pension plans registered in Ontario, the Ontario government's proposed pension reform legislation will, if passed into law, repeal the authority for partial wind-ups.[1] This change will apply where the effective date of the partial wind-up would fall on or after the date on which the law is changed.

However, the authority for partial wind-ups with effective dates prior to that time will remain in force for a transition period of unknown duration. During the transition period, employers may still be at risk of partial wind-up requests or orders for past events.

As a result, the Ontario Court of Appeal's recent decision in *Hydro One Inc. v. Ontario (Financial Services Commission)*[2] will remain relevant to all employers with defined benefit pension plans in Ontario who have terminated employees in the past due to a reorganization or discontinuance of all or part of their business.

The issue before the Court in that case was whether a "significant" number of plan members had been terminated as a result of Hydro One's business reorganization, since this could trigger the right to order a partial wind-up under the Ontario *Pension Benefits Act*.[3] In a unanimous decision, the Court held that the termination of 76 management employees was significant because this number should be

[1] At the time of writing, Ontario's Bill 236, the *Pension Benefits Amendment Act, 2010*, had been directed to Third Reading before the Legislature.

[2] *Hydro One Inc. v. Ontario (Financial Services Commission)*, 2010 ONCA 6.

[3] R.S.O. 1990, c. P.8, hereinafter referred to as the "PBA."

measured only against the "sub-set" of 400 management employees in the plan, as opposed to the 4,000 active plan members as a whole.

The Court decided that it was appropriate to focus on a sub-set of the plan's membership in this case primarily because it found that Hydro One's business reorganization targeted older management employees who were close to retirement, and whose terminations were involuntary. In the Court's view, it was appropriate to take this "flexible" approach in the circumstances, given the "remedial and protective nature" of the PBA, and its "expansive and unrestricted language." The Court cautioned that the determination of what constitutes a "significant" number of plan members "cannot depend on hard and fast rules;" rather, the issue should be determined on the specific facts of each case, and may depend on a host of factors relating to the specific pension plan and reorganization or discontinuance at issue.

In determining whether to measure significance based on a sub-set of plan members, the Court indicated that the following factors, among others, may be relevant:

(i) whether the pension plan at issue distinguishes between different groups, categories or classes of employees;

(ii) whether the plan members whose employment has ceased represent an identifiable subset of the employer's workforce, such that a separate pension plan could have been established for them;

(iii) the size of the suggested subset of members in relation to the employer's overall workforce;

(iv) whether the applicable business reorganization or discontinuance affected only specific targeted employees and, if so, whether the number of targeted employees is a material portion of the plan membership;

(v) whether the terminated members represent proportionately older members of the pension plan, whose retirement years are approaching;

(vi) whether the terminated members ceased their employment voluntarily or involuntarily;

(vii) whether a partial plan wind-up in respect of the identified subset of plan members would threaten the continued viability of the employer's entire pension plan; and

(viii) any other circumstance indicating that the proposed wind-up could jeopardize the security of pension benefits for the continuing plan members.

The Court of Appeal judgment upheld the previous decisions of the Financial Services Tribunal and the Divisional Court in this case, deciding against not only Hydro One, but also against the Superintendent of Financial Services, and the two trade unions that represent the balance of the Plan's membership, the Society of Energy Professionals and the Power Workers Union.

Pension Planning is published quarterly by **Federated Press** and is part of the **Pension Intelligence Series.**

Readers are invited to submit articles for possible publication. They should provide an original and informative analysis of a pertinent topic. Articles are subject to review by the editorial board, and signed articles express solely the opinions of their authors and not necessarily those of the publisher. The contents of this publication should not be construed as professional advice. Readers should consult their own experts before acting.

Notices of change of address and written enquiries should be sent to: Federated Press, Circulation Department, P.O. Box 4005, Station "A," Toronto, Ontario M5W 2Z8. Return postage guaranteed.

Telephone enquiries: 1-800-363-0722 • Toronto: (416) 665-6868, Fax (416) 665-7733 • Montreal (514) 849-6600, Fax (514) 849-0879.

Dépôt légal – Bibliothèque nationale du Québec, 2010.

ISSN 1198-8126 *Printed in Canada*